

In the Supreme Court of the United States

OCTOBER TERM, 1983

PORTSMOUTH REDEVELOPMENT AND HOUSING AUTHORITY
PETITIONER

v.

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND
URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that jurisdiction over this suit seeking operating subsidies, in excess of \$10,000, pursuant to a contract between petitioner and the Department of Housing and Urban Development lies exclusively in the United States Claims Court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 706 F.2d 471. The opinion and order of the district court (Pet. App. B1-B54) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1983 (Pet. App. A2). A petition for rehearing was denied on June 20, 1983 (Pet. App. A22-A23). The petition for a writ of certiorari was filed on July 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Tucker Act, 28 U.S.C. 1346(a)(2) and 1491, as amended, provides in pertinent part:

(1)

1346(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978.

1491 The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

42 U.S.C. 1404a provides in pertinent part:

The United States Housing Authority may sue and be sued only with respect to its functions under this chapter, and sections 1501 to 1505 of this title.

STATEMENT

1. Petitioner Portsmouth Redevelopment and Housing Authority (PRHA) is a public housing authority that operates six low income housing projects in Portsmouth, Virginia. PRHA receives debt service subsidies and operating

subsidies pursuant to provisions of the United States Housing Act of 1937, 42 U.S.C. (& Supp. V) 1437c(a) and 1437g, and a consolidated annual contributions contract (ACC) with the Department of Housing and Urban Development (HUD).

When PRHA entered into the ACC in 1976, 42 U.S.C. 1437g provided in pertinent part: "The Secretary shall embody the provisions for such annual contributions [operating subsidies] in a contract guaranteeing their payment subject to the availability of funds." The ACC itself embodies this statutory provision.¹ In 1979, Congress amended that provision by adding to the above-quoted sentence the following clause: "and such contract shall provide that no disposition of the lower income housing project, with respect to which the contract is entered into, shall occur during and for ten years after the period when contributions were made pursuant to such contract unless approved by the Secretary." 42 U.S.C. (Supp. V) 1437g(a)(1). The Secretary implemented the amendment by issuing a regulation requiring amendments to all ACCs embodying the housing authority's agreement to continue operating its low income housing after it stops receiving federal subsidies. 24 C.F.R. 869.105. PRHA refused to execute the amendment to its ACC, and HUD began withholding operating subsidies. See Pet. App. B2-B3; B25-B31. HUD also declined to consider PRHA's application for modernization funds under 42 U.S.C. (Supp. V) 1437f because PRHA failed to sign the amendment to its ACC. See Pet. App. B31-B33.

¹ Paragraph 415(D) of the ACC states:

The Government shall also make Additional Annual Contributions to the Local Authority (a) for each Fiscal Year in an amount which together with all other Operating Receipts of the Projects will be sufficient to pay the Operating expenditures of such Projects in accordance with the Operating Budgets for such projects as approved by the Government * * *.

2. PRHA filed suit in the United States District Court for the Eastern District of Virginia seeking to compel HUD to release the withheld operating subsidies pursuant to the ACC. PRHA sought to recover more than \$676,000 in withheld funds. It also sought an order requiring HUD to consider its application for modernization funds without regard to whether PRHA had signed the required amendment to the ACC.

Ruling on cross motions for summary judgment, the district court first rejected HUD's contention that exclusive jurisdiction over this contract action was in the United States Claims Court, holding that it had federal question jurisdiction under 28 U.S.C. (& Supp. V) 1331 (Pet. App. B7-B17). The district court also concluded that 42 U.S.C. 1404a waived HUD's sovereign immunity and therefore that PRHA was entitled to pursue its claim (Pet. App. B11-B12). On the merits, the court held that HUD could not apply the statutory amendment to 42 U.S.C. (& Supp. V) 1437g and its implementing regulation to PRHA's existing ACC or to its application for modernization funds, and it permanently enjoined HUD from doing so (Pet. App. B33-B54).

3. The court of appeals agreed that 42 U.S.C. 1404a waived HUD's sovereign immunity (Pet. App. A20). The court held, however, that exclusive jurisdiction over the action lay in the United States Claims Court. The court of appeals therefore vacated the district court's judgment and remanded with instructions to transfer the case to the Claims Court (*id.* at A1-A21).

The court of appeals explained that PRHA's lawsuit satisfies all the criteria needed to vest subject matter jurisdiction exclusively in the Claims Court under the Tucker Act, 28 U.S.C. (& Supp. V) 1346(a)(2). First, the claim is asserted against a federal agency and its officials for acts performed in their official capacity, and any judgment

recovered would expend itself on the federal Treasury (Pet. App. A10-A11). Second, the recovery sought plainly exceeds \$10,000 (*id.* at A11-A12). Third, the claim is primarily founded on a contract with the government (*id.* at A14-A16) and, in any event, the Tucker Act confers jurisdiction on the Claims Court to consider claims founded on the Constitution or federal statutes (*id.* at A16).

The court of appeals further held that jurisdiction in the Claims Court was not defeated because the complaint also seeks declaratory and injunctive relief. The court explained that "framing an essentially monetary claim in injunctive or declaratory terms" does not affect Claims Court jurisdiction (Pet. App. A12, quoting *Hoopa Valley Tribe v. United States*, 596 F.2d 435, 436 (Ct. Cl. 1979)), and, moreover, it stated that the Claims Court can issue declaratory relief that is "tied to and subordinate to a monetary award" (Pet. App. A13, quoting *S.J. Groves & Sons Co. v. United States*, 495 F. Supp. 201, 209 (D. Colo. 1980)). Finally, the court rejected PRHA's argument that 42 U.S.C. 1404a, establishing that the United States Housing Authority may "sue and be sued,"² confers subject matter jurisdiction on the district courts to hear such suits (Pet. App. A17-A20).

ARGUMENT

The only issue presented here concerns the appropriate federal forum for this litigation. It is not disputed that sovereign immunity presents no bar to petitioners' lawsuit; the dispute concerns which court has subject matter jurisdiction. Petitioners contend (Pet. 11-29) that jurisdiction lies in the district court; the court of appeals held that exclusive jurisdiction lies in the United States Claims Court because this is a suit "against the United States" within the

²The functions of the United States Housing Authority have been transferred to the Secretary of HUD. 42 U.S.C. 3534.

meaning of the Tucker Act, and the Tucker Act's specific grant of Claims Court jurisdiction prevails over the general grant of federal question jurisdiction in 28 U.S.C. 1331. The decision below is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, further review of the question of the proper forum for this lawsuit is unwarranted.

1. Petitioner does not seriously dispute that the Tucker Act would permit the Claims Court to exercise jurisdiction over this case. There is little question that the three requirements for Tucker Act jurisdiction are satisfied here: PRHA seeks a money judgment in excess of \$10,000; the claim is founded upon a government contract or federal law; and the claim is "against the United States" because it is brought against a federal agency based on its actions (see *L'Enfant Plaza Properties, Inc. v. United States*, 668 F.2d 1211, 1212 (Ct. Cl. 1982); *Breitbeck v. United States*, 500 F.2d 556, 558 (Ct. Cl. 1974)). See generally Pet. App. A8-A17.³ Petitioner instead maintains that the court of appeals erred in finding that Claims Court jurisdiction was *exclusive*, thereby rejecting the argument that either 28 U.S.C. (& Supp. V) 1331 or 42 U.S.C. 1404a confers subject matter jurisdiction on the district court. See Pet. 14-15, 23.

a. The court of appeals correctly held that subject matter jurisdiction exists here only in the Claims Court in spite of the general grant of federal question jurisdiction to the

³Petitioners contend (Pet 16-20) that they do not seek to recover "Treasury funds" because the monies for the operating subsidies have already been appropriated by Congress and have passed into the control of the Secretary. We agree with the court of appeals that these annually appropriated funds are still "Treasury funds" (see Pet. App. A11), but this question is not relevant to whether subject matter jurisdiction exists in the Claims Court. Regardless of who has control of the funds when the lawsuit is filed, a suit against a federal agency to recover funds already appropriated by Congress plainly satisfies the Tucker Act requirement of a suit "against the United States."

district courts in 28 U.S.C. (& Supp. V) 1331. The courts of appeals have widely recognized that the Claims Court (or its predecessor, the Court of Claims) has exclusive jurisdiction over contract actions against the United States where the amount in controversy exceeds \$10,000 and, therefore, that an action based on a contract may not be pursued under 28 U.S.C. (& Supp. V) 1331, even where the action involves federal statutes or regulations. *Alamo Navajo Bd., Inc. v. Andrus*, 664 F.2d 229, 233 (10th Cir. 1981), cert. denied, 456 U.S. 963 (1982); *Lee v. Blumenthal*, 588 F.2d 1281, 1282-1283 (9th Cir. 1979); *Estate of Watson v. Blumenthal*, 586 F.2d 925, 928, 932 (2d Cir. 1978); *American Science & Engineering, Inc. v. Califano*, 571 F.2d 58, 62-63 (1st Cir. 1978). See also *Chicago Consortium, Inc. v. Brennan*, 599 F.2d 138, 141 (7th Cir. 1979); *International Engineering Co. v. Richardson*, 512 F.2d 573, 577 (D.C. Cir. 1975), cert. denied, 423 U.S. 1048 (1976).

Moreover, even if this suit is treated as one arising under the Constitution, federal statutes, or regulations, rather than as a contract action, it has been held that the more specific grant of jurisdiction in the Tucker Act for suits over \$10,000, where applicable, prevails over the general grant in Section 1331. See *Keller v. MSPB*, 679 F.2d 220, 222 (11th Cir. 1982); *Graham v. Henegar*, 640 F.2d 732, 734-735 (5th Cir. 1981); *Lenoir v. Porters Creek Watershed District*, 586 F.2d 1081, 1087-1088 (6th Cir. 1978). Otherwise, the exclusive jurisdiction of the Claims Court would be largely destroyed because most cases falling within its jurisdiction could also be brought within the general terms of Section 1331. See *Graham v. Henegar*, 640 F.2d at 734. Indeed, the distinction deliberately drawn by Congress in the Tucker Act between suits for greater than or less than \$10,000 would be obliterated. Accordingly, there is no basis here for Section 1331 jurisdiction in the district court.

Petitioner also objects (Pet. 20-22) that Claims Court jurisdiction is improper because of the declaratory and injunctive relief sought. However, as the court of appeals found (Pet. App. A12-A14), the essence of this action is the disgorgement of withheld operating subsidies claimed to be due under petitioner's contract with HUD,⁴ and hence the lawsuit belongs in the Claims Court. The jurisdiction of the Claims Court cannot be avoided by masking a monetary claim as one for equitable relief. See, e.g., *B.K. Instrument, Inc. v. United States*, No. 83-6124 (2d Cir. Aug. 4, 1983), slip op. 28. Petitioner suffers no deprivation of rights by being routed to the Claims Court to pursue its action; that court is empowered to award declaratory relief that is "tied and subordinate to a monetary award." *Austin v. United States*, 206 Ct. Cl. 719, 723, cert. denied, 423 U.S. 911 (1975). See *United States v. Mitchell*, No. 81-1748 (June 27, 1983), slip op. 10. n.15.

b. Petitioner contends (Pet. 14-15) that 42 U.S.C. 1404a itself confers subject matter jurisdiction on the district courts. This contention finds no support in the language of the statute, and petitioner cites no case in which 42 U.S.C. 1404a has been held to permit a suit for damages against the United States in district court. Instead, petitioner relies (Pet. 24-25) on cases involving the National Housing Act, 12 U.S.C. 1702, which provides in relevant part that the Secretary may "sue and be sued in any court of competent jurisdiction, State or Federal" (emphasis added).⁵ As the court of appeals recognized in distinguishing its own precedent under Section 1702 (Pet. App. A18-A20), these cases

⁴Indeed, petitioner sought relief other than money damages only after it amended its complaint. See Pet. 8.

⁵Petitioner also relies on one case, *Mar v. Kleppe*, 520 F.2d 867 (10th Cir. 1975), involving a suit against the Small Business Administration under 15 U.S.C. 634, which contains the same language as 12 U.S.C. 1702.

are manifestly inapposite because the language of that statute is so different from the language involved here that decisions under Section 1702 have little bearing on the question of jurisdiction under Section 1404a. Plainly, Section 1702, by authorizing suit "in any court of competent jurisdiction, State or Federal," provides a basis for district court jurisdiction that is absent here. See *A.L. Rowan & Son v. Department of Housing & Urban Development*, 611 F.2d 997, 1000-1001 n.3 (5th Cir. 1980).⁶

2. Petitioner's contention (Pet. 11-20) that the decision below conflicts with decisions of this Court is without merit. The cases relied upon by petitioner considered only the question whether the government had waived sovereign immunity, not which court had subject matter jurisdiction over the action. *Keifer & Keifer v. RFC*, 306 U.S. 381 (1939), and *RFC v. Menihan Corp.*, 312 U.S. 81 (1941), concerned the scope of the waiver of sovereign immunity of

⁶There is a sound policy justification for this difference between 42 U.S.C. 1404a and 12 U.S.C. 1702. Programs under the National Housing Act involve HUD as an insurer of private initiatives to construct and operate lower income housing. Because the principals are private parties, and may be sued in state courts, the statute provides that the Secretary too may be sued in state court — whether as a necessary party or simply in the interest of judicial economy. Against this background, as the Fourth Circuit held in *Ferguson v. Union National Bank*, 126 F.2d 753, 756 (1942), it would be anomalous to allow suit against the Secretary in any state court yet restrict federal suits to the Claims Court. Moreover, unlike the United States Housing Act programs that are federally funded, many National Housing Act programs are funded by self-generated insurance funds that do not originate in the federal Treasury, and thus suits for money judgments commenced under 12 U.S.C. 1702 would not necessarily expend themselves on the public fisc. Indeed, the courts generally have held that Section 1702 constitutes a waiver of sovereign immunity at all only for actions where the money judgment would be satisfied out of a separate fund, not out of the Treasury. Compare *Lomas & Nettleton Co. v. Pierce*, 636 F.2d 971, 973 (5th Cir. 1971), and *Marcus Garvey Square, Inc. v. Winston Burnett Construction Co.*, 595 F.2d 1126 (9th Cir. 1979), with *S.S. Silberblatt v. East Harlem Pilot Block*, 608 F.2d 28 (2d Cir. 1979).

a governmental corporation, the Reconstruction Finance Corporation. *FHA v. Burr*, 309 U.S. 242 (1940), concerned whether the waiver of sovereign immunity under 12 U.S.C. 1702, which, as discussed above, has little relevance to this case, authorized garnishment of an employee's wages.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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